No. 12,261

IN THE

United States Court of Appeals

For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

REPLY BRIEF OF APPELLANT, SCHENLEY DISTILLERS CORPORATION.

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REPLY BRIEF OF APPELLANT, SCHENLEY DISTILLERS CORPORATION.

PRELIMINARY STATEMENT.

This is the reply brief in the appeal taken by defendant, Schenley Distillers Corporation, from the

judgment against it finding the existence of a contract between the parties, which could have been performed by plaintiff.

In answering defendant's opening brief on these points, plaintiff restated the "questions involved." Plaintiff's statement of the issues raised by defendant on its appeal is not correct. However, during the course of its brief, plaintiff does recognize the points made by defendant, after rearranging the order in which they were made in our brief. For the purpose of this reply, we will discuss plaintiff's brief in the order adopted by it.

ARGUMENT.

A. THE ISSUE OF WHIPPLE'S AGENCY.

Plaintiff first discusses the question of Whipple's status, and argues that he was plaintiff's agent; that he was not, as we contend, acting independently and as a principal.

Plaintiff in its brief states, rather extravagantly, we believe:[1]

> "Nowhere in the evidence is one single thought shown in the minds of any of the parties but that the contract was between the parties to the action."

In addition to the evidence to the contrary set forth on pages 55 to 64 of our opening brief, Mr. Louis B. Stanton, counsel for plaintiff, himself wrote defendant

[1] *Answer to Opening Brief of Appellee*, p. 7.

on June 24, 1946 (a month after the contract was alleged to have been made), stating:[2]

"June 24, 1946

Schenley Distillers Corporation
Empire State Building
New York, New York

Attention: Mr. Metcalf

Gentlemen:

In respect to the contract between *yourselves,* on the one part, and *Compania Engraw Comercial & Industrial S. A.* and *Harold A. Whipple* on the other part, for glucose to be shipped from Argentina:

We have today reviewed the entire correspondence, letters, cables and telephone conversations; with this in view, the writer today phoned to Mr. Berger at Buenos Aires, and as a result of that telephone call and our former communciations, we state as follows:

* * * * * * *

Yours respectfully,
/s/ Louis B. Stanton."[3]

Mr. Stanton wrote this letter as counsel for, and agent of, both plaintiff and Whipple. If he and his clients have since changed their minds about Whipple's status as principal, they nevertheless may not claim that there was not a "single thought" that Whipple was acting other than as plaintiff's agent. There is not only the letter just above quoted, but

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[2]Tr. p. 845; Defendant's Exh. R-3.

[3]Emphasis here and elsewhere unless otherwise noted has been added.

also the substantial evidence referred to in the opening brief.

Plaintiff argues that the parol evidence rule precludes our challenging the existence of this alleged agreement between plaintiff and defendant. This rule has no application to the point made by defendant.

Parol evidence may not vary the terms of a written agreement, but it has no application to the question as to whether a given writing *constitutes* a legally binding agreement. Plaintiff's argument begs the question. In order to argue the parol evidence rule, it must be *assumed* that a contract exists. This assumption so made by plaintiff is one of the very issues on appeal.

In our opening brief, on pages 55 to 64, we set forth the evidence which we contend shows that Whipple was dealing as principal, not as plaintiff's agent. No specific answer is made to these facts.

It is true, as plaintiff states, that defendant did not intend to contract with Whipple. The point is, however, that Whipple continued to deal with plaintiff *as principal*. For example, his "acceptance" or "confirmation" of 1300 tons on May 20, 1946[4] was not based upon any offer or acceptance by defendant; his acceptance on May 21, 1946[5] of 600 tons and the "balance as available" was equally his independent act, and was not based upon nor did it create any agreement between the parties to this action; and the

[4]Tr. p. 157; Defendant's Exh. "A".
[5]Tr. p. 161; Defendant's Exh. "C".

altering of plaintiff's cable to him (i.e. deleting the words, "subject prior sale") was not the act of an agent transmitting offers of his principal.

Even though defendant intended to contract, if at all, with plaintiff, nevertheless plaintiff and Whipple dealt and continued to deal at arm's length, and the contract, if any was made, was between Whipple and plaintiff. The minds of plaintiff and Whipple met on a contract to purchase "up to 1300 tons" of glucose, which plaintiff commenced performing on May 21, 1946, when they agreed upon 600 tons and upon the "balance as available." (They later apparently agreed upon the sale of 1535 tons.) In the middle of *performance* of this agreement for 1300 tons, defendant wrote its letter concerning the 1135 tons. Plaintiff continued to act upon the basis of the 1300 tons agreement until defendant terminated negotiations on June 6, 1946. It then received all the correspondence, and plaintiff and Whipple promptly forgot the 1300 ton agreement (to which defendant was never a party) and pieced together a colorable claim that the only contract that ever existed was one for 1135 tons, made by plaintiff with defendant.

It is certainly clear that plaintiff thought that it had a contract with someone for up to 1300 tons. It is equally clear that no such contract was ever made by defendant. The written evidence shows that Whipple was necessarily the contracting party, for he had no purchaser when he accepted the 1300 ton offer. It is equally clear that *it was the 1300 ton contract,* at 1.30 pesos per kilo that *plaintiff was performing* when

it purchased the 1135 tons. Whipple, not defendant, was the purchaser under that contract.

The burden is upon plaintiff to establish the alleged agreement, and the parties thereto. It has succeeded in proving only an agreement with Whipple, relief from which it is seeking by the attempt to impose upon defendant a completely different contract from the one Whipple either entered into himself with plaintiff or led plaintiff to believe existed.

Plaintiff, on page 6 of its brief, states that we erred in claiming that plaintiff did not learn of the terms of the May 23, 1946, letter (the alleged contract) until after June 6, 1946. We repeat that such is the fact. Whipple did tell plaintiff the price at which he sold by a letter dated May 23, 1946, being forced to do so because the letter of credit was to be opened, if at all, in plaintiff's favor. However, all the conditions in the letter were unknown to plaintiff until after June 6, 1946.[6]

In support of its statement that Whipple advised plaintiff of the terms of defendant's May 23, 1946, letter before June 6, 1946, plaintiff points to defendant's Exhibit "F".[7] That letter does *not* contain all of the conditions of the May 23, 1946, letter as a cursory comparison will show. Especially significant in this letter, however, is the careful perpetuation of the contract for *1300 tons, the contract earlier made by*

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[6]Tr. pp. 191 to 192.
[7]Tr. pp. 165 to 166.

Whipple with plaintiff and the only contract ever made. Whipple stated:[8]

> "We have in our possession a confirming letter from Schenley *authorizing us* to secure *up to 1300 tons* for them in accordance with *your* earlier offer."

No such confirming letter exists, and no such authority was given Whipple. Here again we see the anomaly of Whipple's and plaintiff's position. He states here, with reference to the very contract alleged by plaintiff, that he is acting for defendant, in accepting plaintiff's offer.

The only attempt plaintiff makes to answer the facts we stated concerning Whipple's status is that Whipple necessarily took upon himself "great responsibilities".[9] We submit that Whipple had no right to assume the responsibility of making an agreement with plaintiff for or on behalf of defendant or, so far as the record shows, for anyone else except himself.

Whipple's acts, as agent or otherwise, could not properly be ratified by plaintiff after June 6, 1946. Because of the rule of mutuality of remedy and obligation, one party cannot be bound to a contract unless the other party is bound. In order for ratification to bind the third party therefore, it must be accomplished *before* repudiation, and as we have shown,

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[8]Tr. p. 166.

[9]*Answer to Opening Brief of Appellee*, p. 8.

plaintiff did not know all the conditions of defendant's May 23, 1946 letter until after June 6, 1946.

Restatement of the Law, Agency, Sec. 88;
Albert Steinfeld & Co. v. Broxholme, 59 C. A. 623 (211 P. 473);
Salfield v. Sutter County Land I. & R. Co., 94 Cal. 546 (29 P. 1105);
California Civil Code, Sec. 2313;
Nason v. Lingle, 143 Cal. 363 (77 P. 71).

It has long been settled that a ratification is neither valid nor binding unless the party purporting to ratify knows all the material facts of the matter sought to be ratified and complies with the "equal dignities" rule.

California Civil Code, Sec. 2314;
1 *Cal. Jur.* 777, 778;
California Civil Code, Sec. 2310.

The question and effect of Whipple's status is most clearly brought home by imagining the conclusive defense that could and would have been made by plaintiff (in the absence of the Statute of Frauds) had defendant sued plaintiff on this alleged contract.

B. THERE WAS NO MEETING OF THE MINDS OF THE PARTIES TO THE TERMS OF THE ALLEGED AGREEMENT.

On the question of whether the parties' minds met on the terms of any given contract, plaintiff devotes much of his time to two rules: (1) the knowledge of an agent is imputed to his principal; and (2) "the

form of the contract may be oral or written," if the statute of frauds is satisfied by an appropriate memorandum.

We have no quarrel with either of these rules.

On this point, we argue simply that no contract was created because the parties never agreed to the same terms; that there was never a specific acceptance of any given offer, and no point in the negotiations where both parties contemplated the same terms for any proposed sale. Plaintiff contents itself with the bare statements[10] that our charge is "without warrant" and that "Definite was the agreement for quantity, 1135 tons; price 1.375 pesos per kilogram."

However, plaintiff does not, and cannot deny that it thought it had a contract for up to at least 1300 tons, and that it *actually performed* either this, or another imaginary contract of 1535 tons. Further, plaintiff did not know until *after* May 23, 1946[11] that the price was 1.375 pesos per kilogram.

Forgetting, for the moment, the necessity of a purchase order, the most weight that could be given defendant's letter of May 23, 1946, is that it was a counter offer. It was not an absolute and unequivocal acceptance; further, it varied the terms of the offer and was expressly conditional. Most important was the condition that delivery be made by plaintiff to McCormick Steamship Co.

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[10] *Answer to Opening Brief of Appellee*, p. 11.

[11] When it received Whipple's letter dated May 23, 1946. (Tr. p. 165; Defendant's Exh. "F".)

Plaintiff apparently admits, since it does not challenge, the materiality of this condition. It argues, however, that it was no part of the contract itself; that under the alleged contract, the duty was upon defendant to supply the ships for each delivery, and to engage space. Plaintiff makes this argument in defendant's appeal at the same time that it argues in its own appeal that it had the absolute right to make the monthly delivery on *any* day of the month that it chose.[12] These arguments conflict.

If defendant's letter of May 23, 1946, constitutes a contract, the burden would be upon plaintiff, the seller, to deliver the goods *on board* a McCormick ship. That is the entity defendant selected as agent for acceptance of deliveries and no other was authorized. Plaintiff's failure to agree to this limiting stipulation prior to termination of negotiations, is, apart from all other points, conclusive upon the contract issue.

That plaintiff's argument as to defendant's "duty" to provide a carrier is erroneous, is established by the following cases.

U. S. Trading Corp. v. Newmark G. Co., 56 Cal. App. 176 (205 P. 29);

H. Hackfeld & Co., Ltd. v. Castle, 186 Cal. 53 (198 P. 1041).

These cases also exemplfy the materiality of the condition specifying the carrier.

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[12]*Brief for Appellant* (Compania Engraw C.E.I.), pp. 53 to 54.

On page 16 of its brief, plaintiff states that it was "stipulated" that plaintiff had "full knowledge of the terms and wording" of defendant's letter of May 23, 1946. There is no such stipulation. Defendant did stipulate that on *June 6, 1946,* Whipple prepared and mailed to plaintiff a letter dated June 4, 1946.[13] This is a far different stipulation than that claimed by plaintiff.

Plaintiff next discusses the point we make to the effect that the parties intended to contract, if at all, by purchase order and covering letter of credit. It takes the position that these documents were merely part of the "mechanics" of performance. If the letter of May 23, 1946, were intended to constitute the contract, the execution of a purchase order would be a purely idle act. A purchase order would, of course, have bound the plaintiff as well as the defendant, a situation which, because of the statute of frauds, does not exist if defendant's May 23, 1946, letter is a contract. If plaintiff is correct, it could have refused to sign the purchase order when received, and nevertheless could have held defendant to the alleged contract.

Plaintiff does not explain the facts set forth on pages 42 to 47 of our opening brief, upon which we base this point. It does not even refer to the cable from Whipple to plaintiff, in which, *five days after the alleged contract was made,* Whipple stated:[14]

> "*Subject successful conclusion present negotiations,* Schenley prepared negotiate 1947 production. * * *"

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[13]Tr. pp. 147 to 150.

[14]Tr. p. 134, Plaintiff's Exh. 9.

Only one conclusion can be drawn from the many expressions concerning and references to the purchase order, plus this admission that *negotiations* were still in progress on May 28, 1946, a time when a purchase order was *still* to be issued, but a time five days *after* the date on which plaintiff *now* alleges that the contract was made. No contract was made, or intended to be made on May 23, 1946, and any contract to be made would be created, if at all, by formal purchase order and covering letter of credit.

Plaintiff on page 29 of its brief, quoted testimony indicating that Donnelly did not discuss the purchase order with Whipple. The three lines quoted by plaintiff are misleading, out of their context. Donnelly's testimony actually is as follows:[15]

> "Q. You never mentioned anything to Mr. Whipple at any time about ever requiring the signature of Engraw for anything, did you?
>
> A. No, sir; I did not.
>
> Q. At that time, at least, you personally knew nothing about the issuance of letters of credit, did you?
>
> A. May I qualify when you say 'at that time,' what date are you speaking of?
>
> Q. I am speaking of the time of May 23rd and May 24, 1946. You were not familiar with the process yourself?
>
> A. That is right; I was not familiar.
>
> Q. You personally had the authority to sign that purchase order or any purchase order for that or any other amount right here on the Pacific Coast, didn't you?

[15]Tr. pp. 692 to 694.

A. Yes; I would say I have the authority.

Q. So there wasn't any reason for you to have to send this thing back to Cincinnati?

A. Is that a question?

Q. That is a question.

The Court. Yes.

A. The reason was that because sugar or glucose is something that I normally do not purchase on the West Coast. I prefer always having that handled in Cincinnati, our main office; and then, secondly, the amount was pretty large and I would prefer our head purchasing organization to handle the purchase order for $600,000.

The Court. Let me inject a question. Did you inform Mr. Whipple of either or both of those reasons?

The Witness. No; I did not inform him of the reasons. No, sir.

The Court. *You merely told him that the purchase order would have to be issued?*

The Witness. *That is right.*

The Court. In the East?

The Witness. That is right."

And as to signatures Donnelly testified (Tr. pp. 698-699):

"Q. (by Mr. E. B. Stanton). You say you never advised Mr. Whipple at any time that you would require the signature of Engraw in South America to the purchase order or any other document, did you?

A. No; I did not personally advise Mr. Whipple of that.

Q. You did not direct anyone to advise him of that fact, did you?

A. I did not direct anyone. I just told Mr. Whipple that I would get a purchase order. A purchase order automatically requires a signature, as I said before, to complete the deal.

Mr. E. B. Stanton. I move to strike that last portion of the answer.

The Court. No. This is cross-examination. You can't argue without having an argument back with the witness. Besides, a glance at the order, I think, shows it is a purchase order. That instrument has become very well known in the last 10 years, especially since the war.

Mr. E. B. Stanton. I have no further questions.

The Court. All the purchases made by the Government during the war were by purchase order, all the purchases by the big companies, the aviation companies, during the war were made on that basis. And an examination of the blanks show that they call for a signature by both parties, otherwise that would be a unilateral contract."

Plaintiff also makes much of the fact that certain portions of the printed purchase order form are inapplicable to this transaction. The point is that no purchase order was ever prepared or issued covering this purchase. The parties knew that the agreement if made, would be made by purchase order, the terms of which were subject to review and agreement by them.

The point which defendant makes with respect to the purchase order assumes, for the sake of argument that the minds of the parties informally met upon

specific terms of a specific agreement, which was to be reduced to writing in the form of a purchase order.

Upon this assumption, depending upon the facts, one of two rules is applicable:

(1) All the elements of a contract being present, the parties are bound, if the subsequent writing is meant to be merely a formalized memorial of the agreement (see cases cited by plaintiff); or

(2) Even though all the elements of a contract are present, the parties are *not* bound until the agreement is reduced to writing if it is their intent that the agreement is not to be effective until so reduced to writing. (See cases cited in defendant's opening brief.)

Defendant contends that the facts recited in its opening brief show conclusively that this case is governed by the second rule above stated; that the parties intended to contract, if at all, only by purchase order and covering letter of credit. Indeed, only in this manner could both parties be bound, in view of the provisions of the statute of frauds.

Plaintiff, without reviewing the applicable facts, merely states and relies upon the first of the above rules.

We submit that the evidence is clear upon the point. Neither of the above rules is absolute: only one of them can apply to this case, and the question of which is applicable depends solely upon the facts.

C. PLAINTIFF'S INABILITY TO PERFORM THE ALLEGED AGREEMENT.

It is a part of *plaintiff's* case, and it is its burden, to prove that it could have performed—that it was ready, willing and able to have performed—the contract, and would have done so but for the repudiation. Authorities establishing this to be the law are cited on pages 64 and 65 of our opening brief.

Plaintiff improperly pleaded *performance* of the contract, rather than that it was "ready, willing and able" to have performed.[16] There can be no serious question but that the issue of ability to perform is raised under the general denial. Therefore, plaintiff's argument based upon the pleadings is irrelevant. Defendant pleaded the point affirmatively not because it must be raised in that manner, but because it wished to call court and counsel's attention to the Argentine laws involved. Those laws could have been relied upon to disprove or challenge the pertinent, affirmative portion of plaintiff's case, but defendant felt that the spirit of the new federal procedure, indicated that some notice of the grounds of defendant's denial in this connection would be more consonant with fairness.

In discussing the law relative to this issue, plaintiff confuses (as it did in the trial Court) the rule relating to the necessity of a plaintiff to prove his ability to have performed the contract upon which he sues, with the *defenses* of impossibility of performance and

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[16]In California practice, this is held to be a fatal variance: *Kirk v. Culley*, 202 Cal. 501, at p. 506 (261 P. 994); *Atkinson v. District Bond Co.*, 5 C. A. (2d) 738, at p. 741 (43 P. (2d) 867).

"commercial frustration." The latter two doctrines are not relevant to this case, but form the basis of plaintiff's argument.

Defendant is not defending this action on the ground that *it* could not possibly have performed, or that *its* purposes were frustrated, and seeking, by one of these two defenses, to have the alleged breach excused. What defendant *does* contend is that plaintiff, in order to recover damages for breach of this alleged agreement, must show that it could and would have performed had defendant not breached, and that plaintiff has not satisfied this burden.

A person cannot recover damages for the alleged breach of a contract that he himself could not have performed, for he would otherwise be unjustly enriched.

3 *Williston on Contracts* (rev. ed.) pp. 2346 to 2348, 2464 to 2465.

Where, however, a party who is *able* and *willing* to perform sues another who cannot perform, the latter may seek to excuse his breach by the defenses of impossibility or frustration. These doctrines are matters of defense which relieve one who *cannot perform,* from paying damages to one who has shown he *could* have and wanted to perform. For example, if defendant had sued plaintiff for breach of the alleged agreement, defendant may have set up the Argentine prohibition as the basis of the defense of impossibility or frustration. Such defense may have relieved plaintiff from any obligation to pay damages, but it cer-

tainly does not *perfect* a cause of action in plaintiff's favor against defendant. Plaintiff's inability to perform would give defendant an option to either (1) waive the contract delivery dates and insist on later deliveries, or (2) terminate the contract. It would not, however, have been obligated to accept the later deliveries.

The case of *U. S. Trading Corp. v. Newark Grain Co.,* 56 Cal. App. 176, (205 P. 29) is quite clear on the point. The Court there stated (p. 190 to p. 191):

> "As we have shown, the embargo, though it did not dissolve the contracts, worked a temporary suspension of them, to the extent, at least, that defendant could not be held liable for damages for nondelivery during the life of the embargo or while permits were not procurable. It is a fair inference from the evidence that permits were not procurable by either party during the term of the embargo. Defendant, therefore, until the embargo expiration, could not complete the performance of its contracts, nor could it be held liable for damages for nondelivery during that time. And, though it might have had the right to refuse to accept and pay for barley not tendered until after the expiration of the embargo *(Brooks Tool Mfg. Co. v. Hydraulic Gears Co.,* 89 L.J.K.B. (N.S.) 263 [9 A.L.R. 1507]), nevertheless, plaintiff, if it elected so to do, could hold defendant to a performance of its contracts after the embargo was lifted. That is, notwithstanding defendant's attempted anticipatory breach on October 7, 1919, plaintiff, at its election, could refuse to accept such attempted renunciation by

defendant of its contract obligations, could treat the contracts as subsisting, and could sue for a breach of contract after the time for complete performance had expired, i.e., after the termination of the embargo. (9 Cyc. 698; *Oppenheimer v. Brackman etc. Co.,* 32 Can. S. Ct. 699, 711.) *Because plaintiff, at its election, could treat the time when the embargo should be lifted as the time for completion of performance by defendant,* the damages should be measured as of the date when defendant, after the lifting of the embargo, refused to make further delivery, which was November 12, 1919, the date adopted by the Court for that purpose."

And in *Brooks Tool Mfg. Co., Ltd. v. Hydraulic ears Co., Ltd.* (King's Bench) 89 L.J.K.B. N. S. 53, 9 A.L.R., 1507, the Court said (9 A.L.R. at pp. 508 to 1509):

"In my opinion, the learned judge put the onus on the wrong party. It was not a question whether the defendants could establish justification for canceling the contract, but whether the plaintiffs could establish any reason for forcing the defendants to accept delivery after the delay. The County court judge has held that, because both the parties were controlled establishments, the contract must be altered, and a new term incorporated in it to the effect that, if the plaintiffs are prevented from delivering the goods at the date agreed upon, they can deliver later, and compel the defendants to accept and pay for them, provided that they can show that the delay is due to their having had to execute government orders. In my opinion that is an erroneous view.

> We are not considering here the question whether the defendants could sue the plaintiffs for damages for delay in delivery, which would be an entirely different question; we are considering the exactly opposite question; namely, whether the plaintiffs can demand payment for the goods in spite of the fact that they were delivered long after the time for delivery specified in the contract. If the county court judge was right, very remarkable consequences would ensue. The plaintiffs might deliver more than a year after the time agreed upon, and when the goods might be entirely useless to the defendants; yet the latter would still be bound to accept delivery and pay for the goods. Such a result would, in my view, be entirely unreasonable. In my opinion, therefore, the county court judge was wrong, and there was no ground for reading this new term into the contract. The appeal must be allowed."

The annotation in 9 A.L.R. 1509, following the report of the last cited case, sheds further light on this question.

Turning to the facts, in spite of the statement on pages 67 and 68 of our opening brief, plaintiff continues to ignore the difference between an *application* for, and the *issuance* of a permit. The expert witnesses were unanimous in pointing out that the various laws, orders and prohibitions did not affect *permits already issued.* It is also established without

conflict that no permit was ever issued to plaintiff. Exports could be and were made—even during the periods under consideration—under permits issued *prior* to the effective dates of the orders.

Plaintiff's expert witnesses also traveled this same narrow path between the acts of applying for and receiving a permit. Plaintiff, on page 41 of its brief, quotes, for example, its expert Dr. Padilla who said that there was no "*legal* obstacle to fulfill the contract in those months since an export permit could be *requested* from the government."

Of course, it is immaterial to this issue whether the act of the Peron Government, in refusing new permits, acted "Legally", or as an arbitrary dictatorship.

The question is not limited to whether the *law* prohibited exports; the question is whether *for any* reason plaintiff could not have performed. We believe that the evidence, as detailed in our opening brief, fails to support a finding that plaintiff could have performed this entire, indivisible contract.

CONCLUSION.

We demonstrated in our opening brief, that the evidence does not support the judgment, and that as a matter of law no contract was created between the parties to this action. We submit that plaintiff has failed to answer adequately our argument, and that

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the judgment appealed from should be reversed with directions to enter judgment for defendant.

Dated, San Francisco, California,
January 16, 1950.

Respectfully submitted,
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EDGAR H. ROWE,
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Schenley Distillers Corporation.